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Local Government Law

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LOCAL GOVERNMENT LAW

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During the October 1985 term, the United States Supreme Court rendered a number of decisions of significance for local governments. In the one that is discussed in detail below, the Court upheld a local rent control ordinance against a claim that it had been preempted by the Sherman Act.[1] Other important opinions explained the first amendment rights of nonunion employees who are required to pay agency shop fees, constitutional limits on local land use controls, and tort liability under 42 U.S.C. § 1983. The agency shop opinion required the union to escrow fees that are challenged as insufficiently related to the cost of collective bargaining and to establish procedures for resolution of the challenges.[2] In one of the land use cases, the Court again managed to avoid a definitive ruling on whether a landowner is entitled to monetary damages before an unconstitutional land use regulation is declared invalid by the courts.[3] The other recognized broad local authority over the location of "adult" theaters within the local government's borders.[4] Finally, the tort liability decision held that a local government may be liable under Section 1983 for a deprivation of constitutional rights when the deprivation is based on a single decision made by one who is authorized to make policy for the local government.[5]

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1. Fisher v. City of Berkeley, 106 S. Ct. 1045 (1986); see infra notes 34-46 and accompanying text.

2. Chicago Teachers Union v. Hudson, 106 S. Ct. 1066 (1986)(to satisfy first amendment, union's procedure for handling nonunion employees' claims that agency shop fees are not sufficiently related to the cost of collective bargaining activities must escrow amounts reasonably in dispute while the challenge to the dispute is pending, provide nonmembers with an adequate explanation of the basis on which the deduction is calculated, and offer a reasonably prompt opportunity to challenge the amount of the deduction before an impartial decisionmaker).

3. McDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986)(refusal to approve subdivision is not final and definitive position concerning extent of development that will be permitted and therefore taking claim cannot be resolved at this stage).

4. City of Renton v. Playtime Theaters, Inc., 106 S. Ct. 925 (1986)(city zoning ordinance that prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school is "content-neutral" regulation that does not violate the first amendment).

5. Pembaur v. City of Cincinnati, 106 S. Ct. 1292 (1986). In the lower federal courts, Section 1983 continues to generate much litigation. See, e.g., Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986)(allegation that city arbitrarily denied building permit in violation of state law despite applicant's compliance with zoning ordinance

As usual, the state opinions issued during the 1985-1986 time period cover a broad range of legal issues affecting local governments. Louisiana's appellate courts rendered decisions in cases involving the status and powers of local governments,[6] the validity of the state statute denying jury trials in suits against local governments,[7] preemption of local control by state legislation,[8] local elections,[9] annexation,[10] public

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requirements for issuance of the permit states a substantive due process claim under 42 U.S.C. § 1983); Shelton v. City of College Station, 780 F.2d 475 (5th Cir. 1986)(en banc), cert. denied, 106 S. Ct. 3276 (1986)(zoning board decisions are legislative actions that need only have rational basis and, therefore, zoning board's denial or parking variance that is allegedly arbitrary and capricious, but that is at least rationally related to city's parking problem, does not deny substantive due process); Rhode v. Denson, 776 F.2d 107 (5th Cir. 1985), cert. denied sub nom. Rhode v. San Jacinto County, 106 S. Ct. 2891 (1986)(county is not liable under Section 1983 for tortious and unconstitutional acts of constables who, although elected, lack power to make county policy); Grandstaff v. City of Borger, 767 F.2d 161 (5th Cir. 1985)(police chief's failure to initiate departmental changes following reckless shooting death caused by police officers indicates that officers' reckless conduct was in accordance with existing city policy.)

6. Slay v. Louisiana Energy & Power Auth., 473 So. 2d 51 (La. 1985)(public power authorities are properly classfied as "political subdivisions" under the Louisiana Constitution of 1974); Abadie v. St. Bernard Parish School Bd., 485 So. 2d 596 (La. App. 4th Cir. 1986)(statute requiring school board to adopt procedure whereby any school employee could report grounds for suspension or expulsion of pupil does not prevent person other than school employees from reporting such grounds); Labrosse v. St. Bernard Parish School Bd., 483 So. 2d 1253 (La. App. 4th Cir. 1986)(state statute governing expulsion of students did not give school board authority to expel student for off-campus use of marijuana).

7. Rudolph v. Massachusetts Bay Ins. Co., 472 So. 2d 901 (La. 1985)(statute denying jury trial in suits against the state or its agencies or political subdivisions is not an unconstitutional denial of right to trial by jury or of equal protection).

8. Louisiana Troopers Ass'n v. City of Baton Rouge, 475 So. 2d 376 (La. App. 1st Cir. 1985)(state statute precluding use of state police uniform design precluded city's use of similar design despite initial approval of the city design by the state police commander).

9. Jerro v. Od'Neal, 483 So. 2d 676 (La. App. 3d Cir.), cert. denied, 481 So. 2d 1324 (La. 1986)(six-month domicile requirement for mayoral candidate required passage of six consecutive calendar months regardless of how many days a particular month might contain); Smith v. Lombard, 480 So. 2d 1077 (La. App. 4th Cir. 1986)(candidate's residence in another state did not preclude him from also being a resident of city for purpose of home rule charter provision requiring that mayor be a resident of the city for at least five years immediately preceding his election); Page v. Madere, 472 So. 2d 595 (La. App. 5th Cir. 1985)(recall election was improperly ordered where recall petition contained less than the required percentage of registered voters' signatures even though error occurred because registrar of voters provided inaccurate advice to petitioners as to the number of eligible voters in the district); cf. Deibler v. City of Rehoboth Beach, 790 F.2d 328 (3d Cir. 1986)(city's requirement that candidates for city commissioner be non-delinquent taxpayers violates the equal protection guarantee of the fourteenth amendment because it is not rationally related to asserted governmental interests in securing candidates who are committed to the city or in engendering public respect for elected officials).

10. Lake Charles Harbor & Terminal Dist. v. City of Westlake, 488 So. 2d 484 (La. App. 3d Cir. 1986)(statute permitting city to annex by ordinance property with boundaries that are 90 percent contiguous to the city does not permit city to annex property that

officers,[11] constitutional[12] and civil service[13] protections for local employees,

was bounded on three sides by a lake and ship channel and on the fourth by the city); cf. Goodyear Farms v. City of Avondale, 148 Ariz. 216, 714 P.2d 386 (Ariz. 1986), appeal dismissed, 54 U.S.L.W. 3836 (U.S. June 24, 1986)(No. 85-1690)(statutory system of municipal annexation providing that petition requesting annexation must be signed by owners of real and personal taxable property before municipality can annex property does not violate the fourteenth amendment).

11. Snyder v. Alexandria City Council, 486 So. 2d 1145 (La. App. 3d Cir. 1986)(city council had a ministerial duty, enforceable by mandamus, to hold a hearing to determine whether mayor's temporary disability had terminated so as to allow him to resume his official duties); Juneau v. Avoyelles Parish Police Jury, 482 So. 2d 1022 (La. App. 3d Cir. 1986)(statute providing two-year term for secretary-treasurer of police jury does not authorize appointment of secretary-treasurer to a term that extends beyond term of office of the police jury that made the appointment).

12. Benelli v. City of New Orleans, 478 So. 2d 1370 (La. App. 4th Cir. 1985)(city requirement that moonlighting police officers obtain signed agreements from their secondary employers promising to hold the city harmless from workers' compensation arising from secondary employment and to provide legal defense for claims against officers arising from these jobs violated substantive due process guarantees of the United States and Louisiana constitutions). Questions concerning the scope of the constitutional protections afforded local employees stimulated considerable litigation in the lower federal courts and in other states. See, e.g., Avery v. Jennings, 786 F. 2d 233 (6th Cir. 1986), cert. denied, 54 U.S.L.W. 3837 (U.S. June 23, 1986) (No.85-1817) (practice of hiring public employees from referrals of political allies does not violate first amendment rights of applicants who are not considered because they are not within this informal network); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985)(compelling police officers suspected of drug use to submit to urinalysis does not violate their fourth amendment rights); In re Randolph, 54 U.S.L.W. 2382 (N.J. Sup. Ct. Jan. 7, 1986)(county court's refusal, under statute banning political activity by court personnel, to allow court attendant to continue her court employment while serving on county mental health board, board of assessment, and other local governing bodies, or as officer of nonprofit associations that seek to influence governmental policymaking does not violate the first amendment).

13. Most of the cases challenging the sufficiency of evidence of misconduct or the appropriateness of discipline imposed by a local government were unsuccessful. E.g., Williams v. Department of Police, 487 So. 2d 528 (La. App. 4th Cir. 1986); Fox v. Department of Sanitation, 485 So. 2d 651 (La. App. 4th Cir. 1986); Verneuil v. Sewerage & Water Bd., 485 So. 2d 636 (La. App. 4th Cir. 1986); Mixon v. Department of Police, 483 So. 2d 1298 (La. App. 4th Cir.), cert. denied, 486 So. 2d 752 (La. 1986); Powell v. Alexandria Mun. Fire & Police Civil Serv. Bd., 476 So. 2d 1109 (La. App. 3d Cir.), cert. denied, 479 So. 2d 362 (La. 1985); Curtis v. Sewerage and Water Bd., 474 So. 2d 498 (La. App. 4th Cir. 1985); Robinson v. New Orleans Police Dept., 474 So. 2d 495 (La. App. 4th Cir.), cert. denied, 477 So. 2d 711 (La. 1985); Rodriguez v. Department of Sanitation, 471 So. 2d 316 (La. App. 4th Cir.), cert. denied, 474 So. 2d 1311 (La. 1985). One can, however, discover occasional exceptions with respect to evidentiary matters. E.g., Lanclos v. City of Opelousas, 486 So. 2d 1149 (La. App. 3d Cir. 1986)(arrest and indictment of employee for felony theft of public property and malfeasance in office were insufficient to support employee's termination in absence of proof as to the underlying incidents themselves); Childress v. Department of Police, 487 So. 2d 590 (La. App. 4th Cir. 1986)(civil service commission abused its discretion in upholding police officer's dismissal based on letter from officer's psychiatrist recommending systematic desensitization program for officer who had suffered multiple severe physical injuries in line of duty). In addition, the appellate courts seem somewhat more willing to reverse when the dismissal is challenged as excessive in relation to the misconduct. E.g., Newkirk v. Sewerage &

tenure rights of school employees,[14] retirement benefits,[15] controls imposed by state ethic laws,[16] substantive[17] and procedural[18] limits on the police

Water Bd., 485 So. 2d 626 (La. App. 4th Cir. 1986) (dismissal was too harsh a punishment for employee who inspected all stations within prescribed time, but deviated from pattern for inspection to harass complainant); Serpas v. New Orleans Police Dep't, 483 So. 2d 1259 (La. App. 4th Cir. 1986)(although evidence supported finding that police officer committed battery on parking control aide, misconduct only justified a six-month rather than a fifteen-month suspension); Ziegler v. Department of Fire, 478 So. 2d 1357 (La. App. 4th Cir. 1985)(city's dismissal of captain who was an alleged victim of severe alcoholism was arbitrary and capricious); Nicholas v. Housing Auth., 477 So. 2d 1187 (La. App. 1st Cir.), cert. denied, 480 So. 2d 744 (La. 1985)(failure of employee to provide a management by objectives report requested by his supervisor could constitute insubordination, but was insufficient to support dismissal of employee with a 26-year history of satisfactory employment as a civil servant).

14. Dubuclet v. Division of Employment Security, 483 So. 2d 1183 (La. App. 4th Cir. 1986)(teacher discharged following plea of guilty to charge of possession of marijuana was not entitled to unemployment compensation because he had been discharged for misconduct even though guilty plea was later expunged from the court's records); Wiley v. Richland Parish School Bd., 476 So. 2d 439 (La. App. 2d Cir. 1985)(teacher's conduct in the preceding term could form a valid basis for formal charges of willful neglect of duty).

15. Rue v. Board of Trustees, 484 So. 2d 272 (La. App. 3d Cir. 1986)(retirement board's denial of disability retirement can be overturned only if it is unreasonable, arbitrary, or capricious); Bethard v. State, 471 So. 2d 989 (La. App. 1st Cir.), cert. denied, 475 So. 2d 1109 (La. 1985)(an assistant district attorney was entitled to transfer all contributions and years of service from Municipal Employees' Retirement System and Louisiana State Employees' Retirement System to District Attorneys' Retirement System).

16. Board of Comm'rs v. Comm'n on Ethics for Public Employees, 484 So. 2d 845 (La. App. 1st Cir.), cert. denied, 487 So. 2d 440 (La. 1986)(ethics statute did not preclude attorney who had represented local board while employee of Attorney General's office from contracting with board to provide representation after he had terminated his employment with the Attorney General's office); Louisiana Comm'n on Ethics for Public Employees v. City of Baton Rouge, 471 So. 2d 1008 (La. App. 1st Cir. 1985)(ethics commission had no authority to prohibit city-parish from furnishing counsel for one of its appointees in an investigation by the commission or to obtain a court order prohibiting such conduct).

17. Rodrigue v. Copeland, 475 So. 2d 1071 (La. 1985), cert. denied, 106 S. Ct. 1262 (1986)(loud and extravagant Christmas display caused damages to neighboring landowners that could be redressed by injunction without interfering with the first amendment right of the owner of the display); Forgette v. Vernon Parish Police Jury, 485 So. 2d 237 (La. App. 3d Cir. 1986)(ordinance taxing and regulating retailers who operated without fixed place of business did not violate dormant Commerce Clause nor did it constitute an unreasonable exercise of the police power); Rayborn v. Livingston Parish Police Jury, 479 So. 2d 401 (La. App. 1st Cir. 1985)(police jury acted arbitrarily and unreasonably in denying retail beer permit in absence of evidence that the proposed location violated any of the criteria of the ordinance); Emery v. City of New Orleans, 473 So. 2d 877 (La. App. 4th Cir. 1985)(city requirement that applicant for permit as manager of alcoholic beverage outlet have good character and reputation was a reasonable exercise of police power and city could rely on applicant's arrest record as basis for denying a permit); City of Bossier City v. Gray, 483 So. 2d 1090 (La. App. 2d Cir. 1986)(ordinance defining criminal mischief as acting in a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others was unconstitutional because of its overbreadth).

18. Wilson v. City of New Orleans, 479 So. 2d 891 (La. 1985)(due process requires

power of local governments, zoning,[19] street dedications,[20] expropriation,[21]

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that vehicle owner be provided with opportunity to respond informally to summary of adverse evidence before a neutral decision-maker prior to immobilization of vehicle for failure to pay parking tickets); Housing Auth. v. Austin, 478 So. 2d 1012 (La. App. 3d Cir. 1985), cert. denied, 481 So. 2d 1334 (La. 1986) (tenant's failure to comply with federal grievance procedures constituted waiver of her right to continued occupancy of apartment in public housing project).

19. Three decisions involved the exclusion of group homes for the mentally handicapped from areas zoned for single-family residences. City of Kenner v. Normal Life of La., Inc., 483 So. 2d 903 (La. 1986); Normal Life of La., Inc. v. Jefferson Parish Dep't of Inspection and Code Enforcement, 483 So. 2d 1123 (La. App. 5th Cir. 1986); Special Children's Village, Inc. v. City of Baton Rouge, 472 So. 2d 233 (La. App. 1st Cir. 1985); see infra notes 47-93 infra and accompanying text. In addition, the courts also addressed an assortment of issues in other opinions. E.g., Decuir v. City of Marksville, 488 So. 2d 402 (La. App. 3d Cir. 1986)(landowner must apply to board of adjustment before initiating judicial appeal from city's award of building permit to an adjacent landowner); Lake Forest, Inc. v. Board of Zoning Adjustments, 487 So. 2d 133 (La. App. 4th Cir. 1986)(board of zoning adjustments abused its discretion in granting a building permit to erect a bowling center in a neighborhood business district because a bowling center is more properly classified as an amusement center and should, therefore, be located in a commercial district that authorizes such a use); Lakeshore Property Owners Assoc. v. City of New Orleans, 481 So. 2d 162 (La. App. 4th Cir. 1985), cert. denied, 484 So. 2d 674 (La. 1986)(zoning board of adjustment improperly granted variance where hardship resulted from owner's misrepresentation of building plans on original permit application); Castle Investors, Inc. v. Jefferson Parish Council, 472 So. 2d 152 (La. App. 5th Cir.), cert. denied, 474 So. 2d 1311 (La. 1985)(denial of zoning request was not arbitrary or capricious where council had evidence that property was virtually indistinguishable from surrounding property zoned residential and that area contained a substantial amount of vacant commercial property to meet the needs of neighborhood).

20. Vermilion Parish Police Jury v. Landry, 485 So. 2d 253 (La App. 3d Cir. 1986)(statute authorizing tacit dedication of public road on basis of maintenance by parish authorities for three years does not constitute an unconstitutional taking of private property without just compensation); Central Metairie Civic Assoc., Inc. v. Jefferson Parish Council, 484 So. 2d 706 (La. App. 5th Cir.), cert. denied, 486 So. 2d 751 (La. 1986)(opponents of parish ordinance revoking street dedication have burden of proving council's action was arbitrary and capricious); Bulliard v. Delahoussaye, 481 So. 2d 747 (La. App. 3d Cir. 1985)(abandoned street reverts to adjacent landowners even if it were a part of the property of only one of those landowners at the time it was dedicated to public use).

21. Jungeblut v. Parish of Jefferson, 485 So. 2d 974 (La. App. 5th Cir. 1986)(expropriation statute's two-year prescriptive provision does not apply to land that government begins using without a formal expropriation proceeding); City of New Orleans

local authority to impose taxes[22] and fees,[23] the contracts of local governments,[24] the identification of the responsible entity for imposing state

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v. McKendrick, 485 So. 2d 653 (La. App. 4th Cir. 1986)(trial court erred in failing to consider only present use of property, and not its highest and best use, in determining its value); State v. Sugarland Ventures, Inc., 476 So. 2d 970 (La. App. 1st Cir.), cert. denied, 478 So. 2d 909 (La. 1985)(even after rendition of final judgment in an expropriation proceeding, the state can declare its intention to abandon the public purpose behind the expropriation and decline to pay the amount awarded as compensation); Terrebonne Parish Police Jury v. Kelly, 472 So. 2d 229 (La. App. 1st Cir.), cert. granted, 476 So. 2d 340 (La. 1985), modified, 478 So. 2d 690 (La. App. 1st Cir. 1985)(use of expropriated canal for overflow drainage of sewerage oxidation pond and drainage of subdivision accrued to public and was "public purpose" for expropriation).

22. Sales Tax District No. 1 v. Express Boat Co., 486 So. 2d 947 (La. App. 1st Cir. 1986)(company operating vessels between Louisiana and offshore drilling facilities qualified for statutory provision exempting foreign or interstate commerce from state sales tax, notwithstanding administrative regulation providing that commerce from a point in Louisiana to an offshore area was not interstate commerce); see also Vermilion Parish School Bd. v. Weaver Exploration Co., 474 So. 2d 1032 (La. App. 3d Cir.), cert. denied, 477 So. 2d 1126 (La. 1985)(parish in which goods were delivered by common carrier after being shipped by out-of-state shipper was entitled to collect sales tax on the goods and was not obligated to grant shipper credit for taxes erroneously paid in another state and parish); Parish of Pointe Coupee v. Amoco Prod. Co., 472 So. 2d 292 (La. App. 1st Cir.), cert. denied, 475 So. 2d 1107 (La. 1985)(parish ordinance providing for tender of payment under protest without penalty when payment is made within fifteen days after assessment does not preclude a subsequent payment under protest to permit a challenge).

23. Emery v. City of New Orleans, 473 So. 2d 877 (La. App. 4th Cir. 1985)(fee levied on individual applying to serve as manager of alcoholic beverage outlet was a permit fee and not an occupational license tax).

24. Bill Roberts, Inc. v. City of New Orleans, 485 So. 2d 988 (La. App. 4th Cir. 1986)(when lowest bid on city project was not in proper form, city could choose to reject all bids rather than to award the contract to the second lowest bidder); American Waste & Pollution Control Co. v. Madison Parish Police Jury, 480 So. 2d 761 (La. App. 2d Cir. 1985), cert. granted, 481 So. 2d 1324 (La. 1986)(contract awarded to nonresident in violation of state statute granting state residents a five percent preference is null and void); Heirs of Gremillion v. Rapides Parish Police Jury, 480 So. 2d 748 (La. App. 3d Cir. 1985), modified on other grounds, 493 So. 2d 584 (La. 1986)(money judgment rather than contempt citation was the appriopriate remedy for the failure of police jury to comply with earlier order requiring specific performance of contract with plaintiff); Romero v. Mosquito Control Contractors, Inc., 480 So. 2d 358 (La. App. 3d Cir. 1985)(failure to adopt motions to rescind contract did not amount to a ratification of contract let in violation of the open meeting law). In a case involving the state, the Louisiana Supreme Court held that an unsuccessful bidder on a public contract has no cause of action against the successful bidder in the absence of allegations that the successful bidder assisted or encouraged the public body in some wrongful act in connection with the award of the contract. Alexander & Alexander, Inc. v. State, 486 So. 2d 95 (La. 1986).

tort liability,[25] the standards of liability under articles 2315[26] and 2317[27] of the Louisiana Civil Code, the availability to local governments of tort defenses recognized by state law,[28] liability under 42

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25. Lamkin v. Brooks, 487 So. 2d 1251 (La. App. 3d Cir. 1986)(town is not liable for tort committed by police officer outside the jurisdictional limits of the town); Vance v. Orleans Parish Criminal Sheriff's Dep't, 483 So. 2d 1178 (La. App. 4th Cir. 1986)(city is not liable for criminal sheriff's negligence in managing city house of detention).

26. Kavanaugh v. Orleans Parish School Bd., 487 So. 2d 533 (La. App. 4th Cir. 1986)(school board was not liable for value of property taken from teacher in armed robbery at school because it could not reasonably foresee that an unrepaired hole in a fence, through which the robbers obtained entry, would lead to the robbery); Maxwell v. Audubon Park Comm'n, 482 So. 2d 104 (La. App. 4th Cir. 1986) (park was not liable for injury biker suffered when he ran into an unleashed dog in park, because biker's own negligence was the sole cause of his injuries); Litomisky v. St. Charles High School, 482 So. 2d 30 (La. App. 5th Cir. 1986)(neither high school nor principal is liable for injuries that referee suffered when attacked by fan at a game in high school stadium that had been leased to a third party); Veazey v. Parish of Avoyelles, 476 So. 2d 1057 (La. App. 3d Cir.), cert. denied, 478 So. 2d 1236, 1238 (La. 1985)(parish is liable for failure to erect warning signs sufficient to warn motorists of unusually dangerous hazard consisting of curves leading to a bridge); Daigle v. Hanson, 476 So. 2d 953 (La. App. 1st Cir. 1985)(parish was liable for failing to replace stop sign when it had constructive knowledge that the sign was missing); Brown v. American Druggists' Ins. Co., 476 So. 2d 881 (La. App. 2d Cir.), cert. denied, 479 So. 2d 365 (La. 1985)(sheriff and his deputies were liable in wrongful death actions when deputies negligently allowed dangerous prisoners to escape and murders giving rise to the actions were an integral part of the escape).

27. E.g., Parker v. Audubon Park Comm'n, 487 So. 2d 641 (La. App. 4th Cir. 1986)(park commission not liable for plaintiff's injury where plaintiff failed to prove that hill on which she was walking presented an unreasonable risk of harm); May v. Lafayette Parish Police Jury, 487 So. 2d 503 (La. App. 3d Cir. 1986)(open expansion joint in sidewalk did not present an unreasonable risk of harm); Miller v. State Farm Fire & Cas. Co., 487 So. 2d 459 (La. App. 5th Cir. 1986)(pedestrian who slipped over two to three inch rise in sidewalk assumed the risk because she had previously used the sidewalk and knew that it was uneven); Tischler v. City of Alexandria, 471 So. 2d 1099 (La. App. 3d Cir. 1985)(city held strictly liable for damages arising out of accident caused by utility pole located 41 inches from edge of roadway in a shoulder that was approximately six to eight inches lower than the roadway); Foab v. New Orleans Public Serv., Inc., 471 So. 2d 295 (La. App. 4th Cir.), cert. denied, 475 So. 2d 362 (La. 1985)(where transit authority knew of existence of hole for at least six months before injury occurred, authority's breach of its duty to correct hazard was the sole legal cause of passenger's injury relieving the city of any liability based on its ownership of the property).

28. Three cases involved the construction and constitutionality of the state granting immunity to landowners who permit their property to be used for noncommercial, recreational purposes. Landry v. Board of Levee Comm'rs, 477 So. 2d 672 (La. 1985), on remand, 483 So. 2d 162 (La. App. 4th Cir. 1986); Brooks v. City of Lake Charles, 488 So. 2d 465 (La. App. 3d Cir. 1986); Wadsworth v. Town of Berwick, 484 So. 2d 762 (La. App. 1st Cir. 1986); Fusilier v. Northbrook Excess 7 Surplus Ins. Co., 471 So. 2d 761 (La. App. 3d Cir.), cert. denied, 472 So. 2d 918 (La. 1985); see also LaCroix v. State, 477 So. 2d 1246 (La. App. 3d Cir.), cert. denied, 478 So. 2d 1237 (La. 1985). Those decisions are analyzed in the text accompanying infra notes 94-154. Other significant tort decisions involved the scope of the duties of a permit officer, Hanks v. Calcasieu

U.S.C. § 1983,[29] and the proper construction of the open meeting[30] and public record[31] laws. The discussion that follows analyzes the state decisions in two areas. Both involve the construction of relatively narrow statutes that have prompted considerable litigation, one providing for the location of homes for the mentally handicapped in residential areas[32] and the other granting tort immunity for landowners who allow others to use their property for recreational purposes.[33]

FEDERAL-LOCAL RELATIONS

Antitrust Immunity

Since 1978, local governments have exercised their powers under the specter of potential antitrust liability. In that year, *City of Lafayette v. Louisiana Power & Light Co.*[34] held that a local government could be

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Parish Police Jury, 479 So. 2d 1010 (La. App. 3d Cir. 1985), cert. denied, 481 So. 2d 1354 (La. 1986)(parish permit officer had no duty to determine the correct flood zone classification of property for which owner sought a building permit); a school board's right of indemnity against a school bus driver, Finley v. Bass, 478 So. 2d 608 (La. App. 2d Cir. 1985)(school board was entitled to indemnity from bus driver whose negligent operation of school bus created board's liability to injured party); and liability for false arrest, Dupas v. City of New Orleans, 485 So. 2d 594 (La. App. 4th Cir. 1986)(city liable for damages resulting from false arrest where officer arrested parade spectator, not because he was outside of police barrier, but for making a statement to police officer that was neither obscene nor vulgar); Ross v. Sheriff, 479 So. 2d 506 (La. App. 1st Cir. 1985)(sheriff and his deputies were liable for damages for false arrest and battery when deputies grabbed and arrested plaintiff without reasonable basis); finally, as noted in last year's symposium, Murchison, Developments in the Law, 1984-1985—Local Government Law, 46 La. L. Rev. 491, 517-19 (1986), and in a recent comment, 46 La. L. Rev. 1197 (1986), Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985), held that a statute limiting medical malpractice awards against the state to $500,000 is constitutional only if the state can demonstrate that it bears a reasonable relation to a valid governmental purpose.

29. Ross v. Sheriff, 479 So. 2d 506 (La. App. 1st Cir. 1985)(neither sheriff nor deputies were liable under 42 U.S.C. § 1983 where deputies were guilty of false imprisonment and battery but their actions were not grossly disproportionate to the circumstances). See also supra note 5.

30. Central Metairie Civic Ass'n v. Parish of Jefferson, 478 So. 2d 1298 (La. App. 5th Cir. 1985), cert. denied, 481 So. 2d 631 (La. 1986)(because zoning boards of adjustment are judicial in nature and function, they are not subject to the open meeting law).

31. State v. Shropshire, 471 So. 2d 707 (La. 1985)(initial report filed by police officers following arrest of individual was a public record even though the police department labeled it an "incident report"); Hill v. Mamoulides, 482 So. 2d 26 (La. App. 5th Cir. 1986)(police documents containing name of informant need not be disclosed to journalist where police officer testified that he had promised to keep informant's identity confidential).

32. See infra notes 47-93 and accompanying text.

33. See infra notes 94-154 and accompanying text.

34. 435 U.S. 389, 98 S. Ct. 1123 (1978).

liable for antitrust violations in its provision of utility services. According to the *City of Lafayette* opinion, a local government was entitled to the "state action" immunity from antitrust liability only when it was acting "pursuant to state policy to displace competition with regulation or monopoly public service."[35]

Four years later, *Community Communications Co. v. City of Boulder*[36] further limited the ability of local governments to rely on the state action immunity. *City of Boulder* ruled that the immunity did not apply when a "home rule" local government adopted an ordinance regulating cable television operations within its borders. In the view of the majority, the grant of home rule authority was not a sufficiently clear state authorization of anticompetitive activity to immunize the local government from antitrust liability.

City of Boulder seems, however, to have been the high-water mark of the exposure of local governments to potential antitrust liability. In the years since 1982, both Congress and the Supreme Court have acted to limit the liability that local governments face.[37] A 1984 statute[38] exempted local governments from the treble damages remedy normally available for antitrust violations, although it left local governments subject to public enforcement remedies and private actions for injunctive relief. In addition, the 1985 decision in *Town of Hallie v. City of Eau Claire*[39] extended the state action immunity to a city's refusal to offer sewerage service to unincorporated areas that declined annexation. Not only did *Town of Hallie* reject the suggestion that the state must actively supervise the local government's anticompetitive activities, it also refused to require that state legislation expressly mention the anticompetitive conduct that it sanctions. Instead, it held that a state statute provides a "clear articulation" of state policy to displace competition whenever anticompetitive conduct is "a forseeable result" of the authority the state is conferring.[40]

The Supreme Court continued this trend toward limiting local governments' liability under the antitrust laws with its 1986 decision in

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35. Id. at 413, 98 S. Ct. at 1137.

36. 455 U.S. 40, 102 S. Ct. 835 (1982), analyzed in Murchison, Developments in the Law, 1981-1982—Local Government Law, 43 La. L. Rev. 461, 464-68 (1982).

37. A similar trend also appeared in the opinions of the courts of appeal that were rendered after *City of Boulder*. See Murchison, Developments in the Law, 1982-1983—Local Government Law, 44 La. L. Rev. 373, 380-84 (1983).

38. Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat 2750 (1984), codified at 15 U.S.C. § 34-36 (Supp. 1985), analyzed in Murchison, supra note 28, at 509-10.

39. 105 S. Ct. 1713 (1985), analyzed in Murchison, supra note 28, at 507-08.

40. 105 S. Ct. at 1718-20.

Fisher v. City of Berkeley.[41] Without reaching the question of whether the state action immunity applied, *Fisher* indicated that other defenses available in antitrust actions are also available to local governments. More specifically, the Court refused in *Fisher* to distinguish between state laws and local ordinances in deciding whether an action had been preempted by the Sherman Act. In either case, the federal statute preempts the statute or ordinance only when the state or local law (1) mandates or authorizes conduct that necessarily causes a violation of the federal law in all cases or (2) places irresistable pressure on a private party to violate the federal antitrust law if it is to comply with the statute or ordinance.

Applying this test to a rent control ordinance adopted by the city of Berkeley, the *Fisher* majority held that the Sherman Act did not preempt the local ordinance because the ordinance did not require or encourage violations of the federal statute. The Act's per se rule against price fixing[42] only applied to "concerted effort by more than one entity,"

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41. 106 S. Ct. 1045 (1986). Justice Powell concurred in the judgment, and Justice Brennan dissented.

Justice Powell would have upheld the Berkeley ordinance on the ground that the state action immunity applied. He contended that the rent control ordinance was permissible under *Town of Hallie* because California had "expressly delegated to Berkeley regulatory power that foreseeably would lead to the anticompetitive effects challenged by appellants." Id. at 1052. To reach this conclusion, he relied on a 1972 statute expressly ratifying an earlier rent control plan in the city's charter. Although the previous rent control plan had been invalidated by the California Supreme Court on procedural grounds, Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 550 P.2d 1001 (1976), the state legislature had never taken any action to rescind its previous authorization to impose rent controls. As a result, the Berkeley ordinance was "exempt from the antitrust laws under our decisions in *Town of Hallie* and *City of Boulder*." Id. at 1053.

Justice Brennan's dissenting opinion began by arguing that the majority had misread the relevant price-fixing precedents. He argued that those decisions did not "necessarily . . . require proof of . . . concerted action as a prerequisite to a finding of preemption" by the antitrust laws. Id. at 1054. In his view, the correct principle was considerably broader: it declared "statutes in conflict with the Sherman Act [whenever] they eliminated price competition in the relevant market." Id. In addition, he also argued that the Berkeley ordinance was impermissible even under the majority's analysis. If concerted action were required, he would find it satisfied by the "functional 'combination' . . . between the city of Berkeley and its officials, on the one hand, and the landlords on the other—a combination that operates to fix prices for rental units in Berkeley." Id. at 1055. Finally, Justice Brennan disagreed with Justice Powell's concurring opinion, which contended that the ordinance fell within the state action immunity. He found the 1972 legislative approval of the predecessor rent-control plan vitiated by the judicial invalidation of that plan. Moreover, he regarded both the state authoritization for the city to enact police regulations and its direction for the city to provide adequate housing for all economic segments of the community as too general to establish a "clearly articulated . . . state policy to displace competition . . . ." Id. at 1056.

42. The Court acknowledged that a ceiling on rents would violate the Sherman Act if it were imposed by concerted action on the part of landlords. Id. at 1049.

not to "independent activity by a single entity." In light of this exception to the ban on price fixing, the rent controls established by the ordinance did not violate the federal statute because they were "unilaterally imposed by government."[43]

The Court carefully distinguished the Berkeley controls from the governmentally sponsored systems for price controls that previous cases had held violated the Sherman Act.[44] Those "hybrid" systems did not fall within the exception for unilateral activity because they "merely" used the state's regulatory power to "enforce private marketing decisions" made in concert by private actors. Thus, they were "quite different" from "the purely regulatory scheme" that the Berkeley ordinance established. In contrast to the "hybrid" schemes, the Berkeley ordinance "unilaterally imposed" on the private actors "[n]ot just the controls themselves but also the rent ceilings they mandate."[45]

Local governments will doubtless welcome *Fisher* as an important reaffirmation of local regulatory power. At a minimum, the new decision provides further evidence of the Supreme Court's inclination to avoid the severe restriction of local authority that some anticipated after *City of Boulder*. Not only does *Fisher* confirm that local governments will receive the benefit of antitrust defenses other than the immunity for state action, it also indicates that the Court is likely to apply those doctrines sympathetically when they are raised by local governments. In addition, *Fisher*'s holding seems sufficient by itself to preclude successful challenges to local regulatory schemes, except in those cases where the plaintiff can prove that the government acted in collusion with private economic interests. Of course, only future decisions will define what constitutes impermissible "concerted action," but *Fisher* surely establishes that something more is required than achievement of political success by an identifiable interest. After all, the Berkeley ordinance reflected the success of tenants in securing political support for their campaign to limit the power of landlords.

In sum, *Fisher* merits praise because it limits the extent to which federal antitrust law will hamper local governments in carrying out their regulatory responsibilities. Unfortunately, however, it does not correct the basic error of earlier decisions, which fail to grant local governments

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43. Id.; see also id. at 1050 ("Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board. While the Board may choose to respond to an individual landlord's petition for a special adjustment of a particular rent ceiling, it may decide not to. There is no meeting of the minds here.").

44. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S. Ct. 937 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S. Ct. 745 (1951). Both cases are summarized in 106 S. Ct. at 1050-51.

45. 106 S. Ct. at 1050-51.

their rightful place as subdivisions of the state.[46] A preferable approach would be for either Congress or the Supreme Court to overrule the ill-conceived *City of Boulder* decision and grant local governments immunity from federal antitrust laws whenever they are exercising regulatory powers validly conferred on them by state law.

LAND USE PLANNING

In recent years, the focus of efforts to care for the mentally retarded has shifted from institutionalization to community-based care in the least restrictive surrounding where the individual can function effectively. One widely used alternative has been to place small groups of mentally retarded persons in individual houses under the supervision of live-in attendants. Not surprisingly, this dispersal of the mentally retarded into the larger community has generated considerable opposition that often translates into efforts by private individuals and local governments to keep the mentally retarded out of certain residential areas. To combat this opposition, the mentally retarded have increasingly relied on expanded protections under federal and state law; that reliance has produced a stream of litigation in Louisiana and elsewhere.[47]

Federal protection has come in the form of more careful scrutiny of local ordinances that impose greater burdens on the mentally retarded than are placed on other citizens. In *City of Cleburne v. Cleburne Living Center*,[48] the United States Supreme Court declined to treat the mentally retarded as a suspect or quasi-suspect class for equal protection purposes. Nevertheless, the Court examined the local government's justification for the rule being challenged with more care than has been typical in modern reviews of economic and social legislation. Finding no basis for the belief that a group home for the mentally retarded presented any special threat to the city's legitimate interests, the Court held that requiring a special use permit for the home violated the equal protection clause because it rested on an irrational prejudice against the mentally retarded.

The mentally retarded have received even greater legal protection at the state level. Both the legislature and the appellate courts of Louisiana have supported recent reform efforts designed to integrate the mentally retarded into the larger community.

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46. For a more extensive critique of the decisions imposing antitrust liability on local governments, see Murchison, supra note 36, at 466-67.

47. For summaries of litigation outside Louisiana, see Annot., 41 A.L.R. 4th 1216 (1985); Annot., 32 A.L.R. 4th 1018 (1984).

48. 105 S. Ct. 3249 (1985).

In *Clark v. Manuel*,[49] the Louisiana Supreme Court took the step that the United States Supreme Court subsequently refused to take in *City of Cleburne*. It held that the mentally retarded should be recognized as a quasi-suspect class for purposes of equal protection analysis. The effect of this recognition is to require greater justifications for classifications that adversely impact the mentally retarded. They must "both serve an important governmental objective and be substantially related to achieving that objective."[50] The United States Supreme Court's subsequent decision in *City of Cleburne* has the effect of overruling that holding as a matter of federal constitutional law. Nonetheless, a post-*Cleburne* decision of the Louisiana Supreme Court[51] indicates that the "reasonableness" review recognized in *Clark* will survive as the proper standard under the equal protection clause of the Louisiana Constitution.[52]

The Louisiana Legislature has passed at least two recent statutes encouraging the integration of the mentally retarded into the larger community. The first establishes a services system for the mentally retarded in the Department of Health and Human Services.[53] The second is the Group Home for Handicapped Persons Act,[54] which specifically declares that "mentally . . . handicapped persons are entitled to live in the least restrictive environment in their own communit[ies]" and that they "should not be excluded therefrom because of their disabilities."[55]

The statute that establishes a service system for the mentally retarded declares its purpose to be "to protect the basic human rights of individuals who are mentally retarded."[56] It grants every mentally retarded individual a "right" to "live in the least restrictive residential living option appropriate to his individual needs and abilities,"[57] and defines "appropriate" as a living option that is, "[i]n the least restrictive manner or setting possible, consistent with the best interests of the mentally retarded . . . individual."[58] In addition, it recognizes "community homes" as one of the "residential living options" available to the mentally retarded, and it provides that community homes with no more than six

49. 463 So. 2d 1276 (La. 1985). Justices Marcus, 463 So. 2d at 1286, and Dennis, 481 So. 2d 1322 (La. 1986), filed brief concurring opinions.

50. 463 So. 2d at 1286 (citing Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976)).

51. Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985).

52. La. Const. art. I, § 3.

53. La. R.S. 28:380-444 (Supp. 1986 and 1986 La. Sess. Law Serv. Act 491 and 991 (West)).

54. La. R.S. 28:475-78 (Supp. 1986).

55. La. R.S. 28:476 (Supp. 1986).

56. La. R.S. 28:380(B) (Supp. 1986).

57. La. R.S. 28:390(B)(1) (Supp. 1986).

58. La. R.S. 28:381(3)(B) (Supp. 1986).

persons and two live-in attendants "shall be considered single family units having common interests, goals, and problems."[59]

The Group Home Act defines a "community home" as a licensed facility that provides resident services to a maximum of six persons and uses no more than two live-in supervisors.[60] It does not, however, contain the language declaring such community homes to be "single family units." Instead, it relies on the legislature's "police power"[61] to establish a "statewide policy that community homes are permitt[ed] by right in all residential districts zone[d] for multiple-family dwellings."[62] Furthermore, it requires the "local sponsor" of a community home to secure approval of the proposed site for the home from the local governing authority.[63]

In various parts of the state, sponsors of community homes attempted to locate them in areas restricted by zoning ordinances or building restrictions to single family units. Local residents often opposed those efforts, and the conflict has produced a series of decisions focusing on two issues: (1) the constitutionality of the Group Home Act's requirement that sponsors of community homes secure site approval from the local governing authority, and (2) the effectiveness of local zoning ordinances and private building restrictions in precluding the establishment of community homes in areas normally restricted to single family dwellings.

Clark held the local approval requirement unconstitutional for an area in a parish that was not subject to any other zoning restrictions. In that situation, the supreme court ruled, the requirement for local approval violated equal protection because it imposed special burdens on the mentally retarded that served "no valid [governmental] objective." Accepting the validity of the importance of governmental objectives such as the avoidance of undue concentrations of population, the lessening of congestion in the streets, the preservation of the serenity of the neighborhood, and the protection of residents, the court could discern "no substantial relation" between any of them and the requirement for special approval for community homes.[64]

Following the supreme court's lead, the first circuit ruled that a local government could not delegate approval authority over the location of a community home to property owners. Citing *Clark*, the court of appeal held unconstitutional a local zoning ordinance that allowed community homes only when a majority of the surrounding property owners

59. La. R.S. 28:381(8) (Supp. 1986).
60. La. R.S. 28:447(1) (Supp. 1986).
61. La. R.S. 28:476 (Supp. 1986).
62. La. R.S. 28:478(A) (Supp. 1986).
63. La. R.S. 28:478(C) (Supp. 1986).
64. 463 So. 2d at 1286.

approved of the proposed location.[65] According to the first circuit, the zoning ordinance was unconstitutional because "no substantial relationship" existed "between the restriction on the establishment of special homes for the mentally retarded and any important governmental objective."[66]

In *Clark*, the Louisiana Supreme Court reserved the question of whether the approval requirement would be constitutional in an area that is also subject to zoning restrictions,[67] and the question remains an open one. The fifth circuit has, however, upheld the approval requirement for areas subject to zoning regulations on the ground that "any owner or lessor . . . is required to secure approval of a local governing authority before attempting a special use, exception or variance."[68] Thus, the approval requirement for community homes did not violate the equal protection requirement because "it create[d] no material distinction between the plaintiff and any similarly situated party under the zoning laws."[69]

A number of decisions have allowed community homes to be located in areas restricted to single family dwellings by building restrictions or zoning ordinances.[70] Here again, *Clark* is the leading decision. Relying on the rule requiring strict construction of restrictive covenants,[71] *Clark* allowed a community home to be located in an area subject to building

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65. Special Children's Village, Inc. v. City of Baton Rouge, 472 So. 2d 233 (La. App. 1st Cir. 1985). The ordinance permitted community homes "only after receipt and verification of a petition of endorsement bearing the names, addresses, lot numbers, and suitable property descriptions and signatures of 51% of the property owners of record within a 1,000-foot radius of the proposed site." Id. at 234 (quoting Code of Ordinances of the City-Parish § 2.201).

66. 472 So. 2d at 235.

67. 463 So. 2d at 1282 n.8.

68. Normal Life of La., Inc. v. Jefferson Parish, 483 So. 2d 1123, 1127 (La. App. 5th Cir. 1986).

69. Id.

70. Vienna Bend Subdivision Homeowners Ass'n v. Manning, 459 So. 2d 1345 (La. App. 3d Cir. 1984)(building restriction); Concord Estates Homeowners Ass'n v. Special Children's Foundation, Inc., 459 So. 2d 1242 (La. App. 1st Cir.), cert. denied, 450 So. 2d 959 (La. 1984)(building restriction); Harbour v. Normal Life, 454 So. 2d 1208 (La. App. 3d Cir. 1984)(building restriction); Tucker v. Special Children's Foundation, Inc., 449 So. 2d 45 (La. App. 1st Cir. 1984)(building restriction); City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259 (La. App. 2d Cir. 1981)(zoning ordinance).

71. 463 So. 2d at 1279 (citing Munson v. Berdon, 51 So. 2d 157 (La. App. 1st Cir. 1951)). Louisiana's appellate courts have applied a similar rule of strict construction to zoning ordinances. See City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259, 264 (La. App. 2d Cir. 1981); cf. City of Kenner v. Normal Life of La., Inc., 483 So. 2d 903, 905 (La. 1986)("A zoning ordinance which is subject to more than one reasonable interpretation should be construed in favor of unrestricted use of property.").

restrictions requiring that the property "be used [exclusively] for residential purposes" and forbidding the construction of any structure "other than one detached, single family dwelling."[72] The first restriction did not bar the group home because the occupants of the group home were using it as a residence. The second was inapplicable because it only restricted construction, not use: it did not limit "the number of permitted occupants of such dwelling nor [impose] any requirement that the occupants be related."[73]

More recently, however, the supreme court has recognized the permissibility of some local restrictions on the location of community homes. In *City of Kenner v. Normal Life of Louisiana, Inc.*,[74] the court refused to extend *Clark* to allow community homes to be built in an area where the local zoning ordinance restricted the use of the property to single family dwellings and defined the term "family" to encompass no more than four unrelated persons.[75] Because the community home sponsored by Normal Life would include more than four unrelated persons,[76] Kenner's zoning ordinance forbade its location in the area zoned for single family dwellings; and the supreme court held that the ordinance did not conflict with either of the statutes that addressed the subject of community homes for the mentally retarded.

The court easily disposed of the Group Home Act. Because its authorization for group homes in residential areas only covered districts zoned for multi-family dwellings,[77] it did not apply to an area zoned for single family dwellings.

The statute establishing a state-wide system of services for the mentally retarded received more extended analysis, but the court ultimately concluded that it did not authorize the location of community homes in areas zoned for single family dwellings. Although the law does define community homes with six or fewer residents as "single family units having common interests, goals, and problems,"[78] the statute provides no further indication "that the Legislature intended to exercise its police

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72. 463 So. 2d at 1278.

73. Id. at 1279.

74. 483 So. 2d 903 (La. 1986).

75. The ordinance defined a single family dwelling as "[a] building designed for or occupied exclusively by not more than one family," and Normal Life argued that it satisfied the definition because the community home was located in a dwelling that was "designed" to be exclusively used by one family. The supreme court, however, rejected that interpretation as unreasonable, for under it the ordinance "would never prohibit use of a building with one kitchen by more than one family." Id. at 905.

76. "The City conceded that Normal Life could use the building for occupancy by four or fewer unrelated persons, but Normal Life's official explained that any number below six was not economically feasible." Id. at 906 n.4.

77. La. R.S. 28:478(A) (Supp. 1986); see also 1981 La. Acts No. 892 (Title).

78. La. R.S. 28:381(8) (Supp. 1986).

power to require local governing authorities to permit the use of property as [community] homes . . . in single family residential districts."[79] Therefore, the court concluded that the statutory definition "was apparently designed for administrative use in providing services" to the mentally retarded.[80]

Taken as a group, the decisions of the last two years appear to have defined with some precision the control that local governments can exercise over the location of community homes for the mentally retarded. They forbid a requirement of local approval in areas that are not subject to zoning restrictions, but probably allow the approval requirement when community homes are allowed as a state-authorized special use in areas that are covered by zoning ordinances. Substantively, local governments can exclude community homes from areas zoned for single family dwellings, but only if the zoning ordinance is carefully worded to limit the number of unrelated persons who can occupy a single family dwelling.

Clark establishes the constitutional criterion for evaluating any requirement of special approval for the site of a community home: a local government must show that a requirement that imposes greater restrictions on property used to house the mentally retarded than those normally imposed on other property owners has a "fair and substantial relation" to some important governmental objective. Applying this standard, the Louisiana Supreme Court invalidated the state's approval requirement for unzoned property because it subjected community homes to a burden not applied to other uses.[81] Similarly, the first circuit held that, even in an area zoned for single family dwellings, a requirement for approval by surrounding property owners was unconstitutional because other uses did not require similar approval.[82] On the other hand, the fifth circuit upheld the requirement for approval by the local governing authority in an area where any application for a special use would be subject to a similar approval requirement under the parish zoning ordinance.[83]

At first glance, the fifth circuit's decision would seem to permit a local government to preclude the use of any site when it was opposed to community homes in residential areas, but that inference seems unwarranted for at least two reasons. First, recent zoning decisions have

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79. 483 So. 2d at 907. By contrast, the legislature specifically declared such an intent in the Group Home Act. La. R.S. 28:476 (Supp. 1986).

80. 483 So. 2d at 907.

81. Clark v. Manuel, 463 So. 2d 1276 (La. 1985); see supra notes 50-53, 65 and accompanying text.

82. Special Children's Village, Inc. v. City of Baton Rouge, 472 So. 2d 233 (La. App. 1st Cir. 1985); see supra notes 66-67 and accompanying text.

83. Normal Life of La., Inc. v. Jefferson Parish, 483 So. 2d 1123, 1127 (La. App. 5th Cir. 1986); see supra notes 69-70 and accompanying text.

established the necessity of standards limiting a local government's discretion as to when requests for special exceptions to a zoning classification should be permitted.[84] Second, both the constitutional rule discussed in the preceding paragraph and the statutory commitment to allowing the mentally retarded to live in the least restrictive environment in their own communities[85] should preclude a standard based on prejudice against the mentally retarded.[86]

In light of *City of Kenner*, the state's commitment to locating community homes in residential areas is subject to an important qualification. It permits local ordinances that exclude community homes from areas zoned for single family dwellings.[87] The statutory authorization for locating homes in residential areas only applies to areas zoned for multi-family dwellings. Moreover, although the supreme court did not explicitly address the constitutional issue, the ordinance challenged in *City of Kenner* appears to be constitutional under the *Clark* standard because its restrictions are based on the relationship of the residents and not their mental capacity. Of course, an effective ordinance will have to be carefully drafted because the state's appellate courts are likely to continue to rely on the statutory definition of community homes as "single family units"[88] when an ordinance does not expressly require that the occupants of the dwelling be related to one another.[89]

One question which remains uncertain is whether carefully worded building restrictions could also exclude community homes. The decisions thus far have avoided the question by strictly construing the restrictions,[90] and that trend is likely to continue. Eventually, however, someone will rely on a restrictive covenant that is as explicit as the ordinance that was upheld in *City of Kenner*. When that question arises, Louisiana's courts should hold that the statutory commitment to returning the mentally retarded to their communities[91] limits the ability of private individuals to exclude them. Although that interpretation would slightly diminish the rights of property owners, it should not constitute a taking

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84. E.g., Tiber Petroleum, Inc. v. Parish of Jefferson, 391 So. 2d 1178 (La. 1980); Summerell v. Phillips, 282 So. 2d 450 (La. 1973); see generally Murchison, Developments in the Law, 1980-1981—Local Government Law, 42 La. L. Rev. 564, 580-83 (1982).

85. La. R.S. 28:476 (Supp. 1986).

86. Such a standard would also appear to violate the Fourteenth Amendment's guarantee of equal protection as applied in City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985). See supra note 49 and accompanying text.

87. La. R.S. 28:478(A) (Supp. 1986).

88. La. R.S. 28:381(8) (Supp. 1986).

89. E.g., City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So. 2d 259 (La. App. 2d Cir. 1981); cf. Clark v. Manuel, 463 So. 2d 1276 (La. 1985)(building restriction).

90. See Clark v. Manuel, 463 So. 2d 1276 (La. 1985); cases cited at supra note 71.

91. La. R.S. 28:476 (Supp. 1986).

of property that would require compensation,[92] and it would implement the legislature's intent "to protect the basic human rights of individuals who are mentally retarded."[93]

TORT LIABILITY

The Louisiana Legislature has passed two separate statutes limiting the tort liability of persons who allow others to use their property for certain recreational purposes. Over the last several years, governmental entities have frequently relied on these statutes in defending tort actions, and the resulting series of cases has served to limit the usefulness of the statutory protections for local governments.

The legislature enacted La. R.S. 9:2791, the first of the statutes providing special protection for property owners, in 1964.[94] The 1964 statute applies to all "premises" except those "used principally for a commercial, recreational enterprise for profit,"[95] and defines "premises" as including "land, roads, waters, water courses, private ways and buildings, structures, machinery or equipment thereon."[96] When premises covered by the statute are entered or used "by others for hunting, camping, hiking, sightseeing, or boating," the statute exempts the "owner, lessee, or occupant" from any duty of care "to keep such premises safe for entry or use" or "to give warning of any hazardous conditions, use[s] . . ., structure[s], or activities on such premises." In addition, the statute also declares that an owner, lessee, or occupant who gives "permission to another to enter the premises for such recreational purposes" does not thereby "extend any assurance that the premises are safe for such purposes[,] . . . constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person[s] to whom permission is granted."[97] The only exception to the broad exemption granted by the statute is the caveat that the legislation "does not exclude any liability which would otherwise

92. A regulatory limit on property rights amounts to a taking only if it prevents the owner from making economically viable use of the property. United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455, 459 (1985).

93. La. R.S. 28:380(B) (Supp. 1986).

94. 1964 La. Acts No. 248, §§ 1-3, codified as La. R.S. 9:2791 (1965). One appellate judge has declared that the sole purpose of the 1964 legislation was to overrule the decision in Daire v. Southern Farm Bureau Casualty Ins. Co., 143 So. 2d 389 (La. App. 3d Cir.), cert. denied, (La. 1962). See Fusilier v. Northbrook Excess & Surplus Ins. Co., 471 So. 2d 761, 768 (La. App. 3d Cir. 1985) (Foret, J., concurring).

95. La. R.S. 9:2791(B) (1965).

96. La. R.S. 9:2791(C) (1965).

97. La. R.S. 9:2791(A) (1965).

exist for deliberate and willfull or malicious injury to persons or property."[98]

As part of a symposium published in this Review, Professor Wex Malone authored an article in which he criticized the 1964 Act.[99] Basically, he argued that the statute was unnecessary in light of the very limited protection that was normally afforded to trespassers and gratuitous licensees.[100] In addition, he objected to the statute as a potential "source of considerable confusion" and mentioned four specific concerns: (1) the lack of any specification of, or justification for, the reduced protection that the statute suggests "campers, hunters, fishermen, and the like" are to receive;[101] (2) the use of the terms "hiking" and "sightseeing" in the list of purposes covered by the statute;[102] (3) the failure to distinguish between users who are adults and those who are children;[103] and (4) the possibility that the statute's immunity might be extended to "activities in which . . . [the owner] may engage in the presence of trespassers or licensees."[104]

Despite this criticism, the legislature never repealed or amended La. R.S. 9:2791. Instead, it supplemented the 1964 statute with a 1975 Act that was also designed "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes."[105]

Based on a model act promulgated by the Council of State Governments,[106] the 1975 statute was designated La. R.S. 9:2795. In large

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98. La. R.S. 9:2791(B) (1965).

99. Malone, Louisiana Legislation of 1964: A Symposium—Torts, 25 La. L. Rev. 47 (1964).

100. Id. at 47 (summarizing duty of care owed by landowners).

101. Id. at 48.

102. Id.

103. Id.:

> Is a child who wanders into the property of an industrial establishment to satisfy his curiosity or his instinct for play to be regarded as a 'sightseer" or "hiker," and does the legislature intend thus to abolish or modify the widely accepted Attractive Nuisance Doctrine? No one can seriously believe that the legislature had any such intention, but the statute invites the argument and faces the courts with the necessity of drawing more specious distinctions in an area of law that is just emerging from a state of confusion in Louisiana.

A federal decision has held that La. R.S. 9:2791 did not abolish the attractive nuisance doctrine. Smith v. Crown-Zellerbach, 638 F.2d 883, 885 (5th Cir. 1981).

104. Malone, supra note 99, at 49.

105. 1975 La. Acts No. 615, § 1.

106. See 24 Council of State Gov'ts, Suggested State Legislation 150 (1965)(Public Recreation on Private Lands: Limitations on Liability)[hereinafter cited as Suggested State Legislation]. The Louisiana statute does not identify its source in the suggested legislation of the Council of State Governments. Nonetheless, that origin is apparent because of the close correlation between the wording of the statute and the suggested legislation, par-

measure, the 1975 law parallels the earlier statute. For example, section 2795 provides that giving permission to another to use one's land does not "[e]xtend any assurance that the premises are safe for any purpose," constitute the person who granted the permission "the legal status of an invitee or licensee to whom a duty of care is owed," or impose liability on the owner "for any injury to person or property" that is incurred by the person who is given permission to use the property.[107] In addition, the 1975 statute also defines the term "land" in a manner analogous to the definition of "premises" in La. R.S. 9:2791,[108] exempts "owner[s] of commercial recreational developments or facilities" from its coverage,[109] and preserves the normal liability rules for "willful or malicious failure to warn against a dangerous condition, use, structure, or activity."[110]

One can, however, identify several distinctions between the two statutes. First, section 2795 (following the model act on which it is based) defines the "owner" to whom its protections extend in common law terms rather than in the normal ownership categories recognized under the Louisiana Civil Code.[111] Second, section 2795 expressly expands the reach of the earlier statute by broadening the list of recreational purposes covered by the immunity,[112] by extending the protections "regardless of [the] age" of the person who is given permission to use the land,[113] and by allowing its provisions to apply whether or not the owner charges for the grant of permission to use the land.[114] On the other

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ticularly the use of common law terms to define "owner." Id. at 151 (section 2(b)); La. R.S. 9:2795(A)(2) (Supp. 1986).

Similar statutes granting immunity for recreational uses have been adopted in a number of other states. For a recent annotation surveying decisions under those statutes, see Annot., 47 A.L.R. 4th 262 (1986).

107. La. R.S. 9:2795(B) (Supp. 1986).

108. La. R.S. 9:2795(A)(1) (Supp. 1986)("'Land' means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.").

109. La. R.S. 9:2795(B) (Supp. 1986).

110. Id.

111. La. R.S. 9:2795(A)(2) (Supp. 1986)("'Owner' means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.").

112. La. R.S. 9:2795(A)(3) (Supp. 1986)("'Recreational purposes' includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized vehicle operation for recreational purposes, nature study, water skiing, ice skating, sledding, snow mobiling, snow skiing, summer and winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.").

113. La. R.S. 9:2795(A)(5) (Supp. 1986)(definition of "person.")

114. La. R.S. 9:2795(B) (Supp. 1986); see also La. R.S. 9:2795(A)(4) (Supp. 1986)("'Charge' means the admission price or fee asked in return for permission to use lands."). This provision is an addition to the model act, which only covers permission granted "without charge." Suggested State Legislation, supra note 106, at 151 (section 4).

hand, section 2795 omits the language of section 2791[115] declaring that an owner, lessee, or occupant owes no duty of care to those to whom permission is granted[116] and disavows any intent to modify an owner's duty "to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care."[117]

The initial decisions of the courts of appeal were generally favorable to governmental defendants relying on sections 2791 and 2795.[118] Cases from the first,[119] third,[120] fourth,[121] and fifth[122] circuits have held the

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115. La. R.S. 9:2791(A) (1965).

116. Curiously, a similar declaration is included in a section of the Council of State Government's suggested state legislation, but that section was omitted from the Louisiana statute. See Suggested State Legislation, supra note 106, at 151 (section 3).

117. La. R.S. 9:2795(D) (Supp. 1986).

118. A decision from the United States District Court for the Western District of Louisiana prior to Keelen v. State, 463 So. 2d 1287 (La. 1985), granted immunity to a governmental defendant. See McCain v. Commercial Union Ins. Co., 592 F. Supp. 1 (W.D. La. 1983) (recreation district was entitled to immunity for injuries sustained in its swimming pool). For a decision of the fourth circuit that broke the general trend of the Louisiana courts of appeal and held the immunity statute inapplicable, see Smith v. Southern Pac. Transp. Co., Inc., 467 So. 2d 70 (La. App. 4th Cir. 1985) (immunity statutes inapplicable to accident where top of van struck an overpass on a street in the city park).

Not surprisingly, the decisions of the courts of appeal have been less favorable to governmental defendants since the supreme court's restrictive construction of the immunity statutes in Landry v. Board of Levee Comm'rs, 477 So. 2d 672 (La. 1985), and Keelen v. State, 463 So. 2d 1287 (La. 1985). See, e.g., Wadsworth v. Town of Berwick, 484 So. 2d 762 (La. App. 1st Cir. 1986)(immunity not applicable to injuries suffered by a child when she fell off a slide in the town's park); Brooks v. City of Lake Charles, 488 So. 2d 465 (La. App. 3d Cir. 1986)(immunity not applicable to an incident in which a child fell off a dock and drowned because the civic center complex where the accident occurred was not the "true outdoors" covered by the immunity statutes); Fusilier v. Northbrook Excess & Surplus Ins. Co., 471 So. 2d 761 (La. App. 3d Cir. 1985)(immunity not applicable to injury child suffered while playing near football field on school board's property). However, several judges on the third circuit have publicly criticized the supreme court's construction of the immunity statutes, see LaCroix v. State, 477 So. 2d 1246, 1251-52 (La. App. 3d Cir. 1985)(King, J., concurring); Fusilier v. Northbrook Excess & Surplus Ins. Co., 471 So. 2d 761, 766-68 (La. App. 3d Cir. 1985)(Domengeaux, J., dissenting); id. at 768-69 (Foret and King, JJ., concurring), and that court has still been willing to read the statute sympathetically in situations not directly covered by the supreme court's test. LaCroix v. State, 477 So. 2d 1246 (La. App. 3d Cir. 1985)(state entitled to immunity for accident occurring in rural creek even though the Department of Transportation and Development only had a highway easement over the area).

119. Keelen v. State, 454 So. 2d 147 (La. App. 1st Cir. 1984), rev'd on other grounds, 463 So. 2d 1287 (La. 1985); Rushing v. State, 381 So. 2d 1250 (La. App. 1st Cir. 1980).

120. Thomas v. Jeane, 411 So. 2d 744 (La. App. 3d Cir. 1982); Pratt v. State, 408 So. 2d 336 (La. App. 3d Cir. 1981), cert. denied, 412 So. 2d 1098 (La. 1982).

121. Landry v. Board of Levee Comm'rs, 466 So. 2d 758 (La. App. 4th Cir.), rev'd on other grounds, 477 So. 2d 672 (La. 1985).

122. Rodrigue v. Fireman's Fund Ins. Co., 449 So. 2d 1042 (La. App. 5th Cir. 1984).

protections applicable to governmental defendants; and *Pratt v. State*,[123] the leading decision of the third circuit, upheld the statute against a claim that it violated the state constitution's abrogation of governmental immunity.[124] Moreover, the courts of appeal have given the statutes a sympathetic interpretation in a variety of settings. For example, decisions have construed the statutes to encompass claims based on article 2317 as well as those based on article 2315 of the Civil Code,[125] and to bar claims premised on the negligence of the defendant's employees as well as those premised on the condition of the land.[126] Others have also limited the exceptions for "commercial recreational" enterprises and developments to those operated for a profit[127] and refused to adopt a broad definition of the exception for "willful and deliberate" actions.[128]

Governmental defendants, however, have fared considerably worse in the two cases that have reached the Louisiana Supreme Court. Both decisions held the statutes inapplicable by narrowly defining the types of uses that the statutes cover. In that way, the majority has managed to avoid considering[129] Justice Dennis' argument[130] that the protections of the statutes do not extend to governmental defendants.

The supreme court's initial decision came in October 1985. *Keelen v. State*[131] held the immunity statutes inapplicable to the drowning of a child in a swimming pool in Fountainbleau State Park. Before proceeding to the merits of the litigation, *Keelen* identified several principles of construction that applied to the immunity statutes. Two are worthy of special note. First, the statutes should be strictly construed because "they are in derogation of a common right." Second, the two statutes "should be read *in pari materia*" because they "relate to the same subject matter."[132]

Using these principles as a guide, *Keelen* declared that La. R.S. 9:2791 and 2795 only conferred immunity on "landowners who offer

123. 408 So. 2d 336 (La. App. 3d Cir. 1981), cert. denied, 412 So. 2d 1098 (La. 1982).

124. Id. at 342.

125. Thomas v. Jeane, 411 So. 2d 744, 747 n.4 (La. App. 3d Cir. 1982).

126. Keelen v. State, 454 So. 2d 147, 150 (La. App. 1st Cir. 1984), rev'd on other grounds, 463 So. 2d 1287 (La. 1985)(state not liable for negligence of lifeguards).

127. Id. at 149; Thomas v. Jeane, 411 So. 2d 744, 746-47 (La. App. 3d Cir. 1982); Pratt v. State, 408 So. 2d 336, 342 (La. App. 3d Cir. 1981), cert. denied, 412 So. 2d 1098 (La. 1982).

128. Rushing v. State, 381 So. 2d 1250, 1252 (La. App. 1st Cir. 1980); accord, LaCroix v. State, 477 So. 2d 1246, 1250-51 (La. App. 3d Cir. 1985).

129. Landry v. Board of Levee Comm'rs, 477 So. 2d 672, 673 (La. 1985); Keelen v. State, 463 So. 2d 1287, 1289 (La. 1985).

130. Keelen v. State, 482 So. 2d 618 (La. 1986)(Dennis, J., concurring).

131. 463 So. 2d 1287 (La. 1985).

132. Id. at 1289.

their property for recreation that can be pursued in the 'true outdoors.'"[133] The court gave two justifications for this construction. For one thing, "the use of the language 'land and water areas'" in the purpose section of the 1975 legislation[134] suggested "open and undeveloped expanses of property."[135] In addition, "the type of recreational activities enumerated in both statutes—hunting, fishing, trapping, camping, nature study, etc.—can normally be accommodated only on large tracts or areas of natural and undeveloped lands located in thinly-populated rural or semi-rural locales."[136]

Keelen constructed a two-part test for determining whether the immunity applied to a particular piece of property. The initial inquiry was whether the property qualified as an "undeveloped, nonresidential rural or semi-rural land [area]."[137] If that criteria were satisfied, the next question was what type of "condition or instrumentality" caused the injury. If "the injury-causing condition or instrumentality" is a "type normally encountered in the true outdoors," the statutes provide immunity to the owner. On the other hand, if "the instrumentality, whether found in an urban or rural locale," is a "type usually found in someone's backyard, then the statutes afford no protection."[138]

Once it had defined the coverage of the statutes in this fashion, the supreme court had little difficulty in determining that they did not apply to the *Keelen* drowning. Although determination "of whether Fountainbleau State Park is non-residential, unimproved rural or semi-rural property" would require "a review of facts not" before the court, resolution of that factual question was unnecessary. Regardless of whether the park constituted the type of property covered by the statute, a swimming pool—the instrumentality that caused the injury—"is not the type of instrumentality commonly found in the true outdoors." Therefore, the court held, "an injury which occurs in a swimming pool is not subject to a defense of immunity under La. R.S. 9:2791 and 2795."[139]

Eight months after the decision in *Keelen*, the supreme court held that the immunity was also inapplicable to an injury suffered by a recreational crab fisherman when he fell trying to avoid a hole in the ground adjacent to the Lake Ponchartrain seawall on the New Orleans lakefront. *Landry v. Board of Levee Commissioners*[140] treated the nature

133. Id. at 1290.

134. 1975 La. Acts No. 615, § 1; see text accompanying supra note 105.

135. 463 So. 2d at 1290.

136. Id. The list does, however, include some activities—e.g., "ice skating" and "summer and winter sports"—that would not always be conducted in rural or semi-rural areas. La. R.S. 9:2795(A)(3) (Supp. 1986).

137. 463 So. 2d at 1290.

138. Id.

139. Id. at 1290-91.

140. 477 So. 2d 672 (La. 1985).

of the "injury-causing instrumentality," the decisive issue in *Keelen*, as irrelevant when the property involved was neither rural or semi-rural. Once the court recognized the rural charater of the property as a threshold requirement for the applicability of the statutes, it had little difficulty holding them inapplicable in *Landry* where the injury had occurred in "a recreational area within a populated city, adjacent to a much travelled Lakeshore Drive, and within a stone's throw of an exclusive residential area developed in the City of New Orleans many years ago."[141]

Especially when combined with the more recent decision in *Landry*, *Keelen* serves to emphasize the limited character of the protections that La. R.S. 9:2791 and 2795 provide for landowners who make their land available for noncommercial uses. In general, the statutes are subject to a rule of strict construction that apparently confines their reach to those matters they expressly cover. More specifically, the statutes only apply to property possessing the characteristics of the "true outdoors," and this requirement limits them to factual situations that satisfy both prongs of a two-part test. As a preliminary matter, the property involved must have a "rural or semi-rural" character. Moreover, even if the property has this character, the immunity only applies when the instrumentality causing the injury[142] is also typical of things found in the "true outdoors."[143]

Although *Keelen* implicity confirms the applicability of the immunity to child victims[144] and to nonprofit institutions that charge for the privilege of using the property,[145] a number of other issues remain unresolved. Only a single footnote in one decision has addressed the question of whether the statutes confer immunity with respect to 2317 as well as 2315 claims,[146] and the first circuit has used the statute to

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141. Id. at 675. On remand, the fourth circuit held that the levee board was not liable for Landry's injury because it had not been negligent in maintaining the property and the hole did not present an "unreasonable" risk of harm. Landry v. State, 483 So. 2d 162 (La. App. 4th Cir. 1986).

142. The supreme court's construction of the recreational use statutes reflects yet another illustration of a recent tendency to focus on causation in defining the limits of tort liability. See, e.g., Loescher v. Parr, 324 So. 2d 441 (La. 1975). For a persuasive criticism of this reliance on causation in defining tort doctrines, see Malone, Ruminations on Liability for Acts of Things, 42 La. L. Rev. 979, 990, 1009 (1982).

143. 463 So. 2d at 1289-90.

144. The victim in *Keelen* was the plaintiff's eight-year old son. Id. at 1288.

145. Id. at 1289 ("Both statutes contemplate that the limitation of liability will not be granted to commercial recreational facilities which are run for profit. . . . An affidavit submitted in support of the State's motion for summary judgment establishes that Fountainbleau State Park does not earn a profit.").

146. Thomas v. Jeane, 411 So. 2d 744, 747 n.4 (La. App. 3d Cir. 1982).

excuse an owner for the negligence of its employees[147] despite the apparently clear provision to the contrary in section 2795.[148] Most importantly, the supreme court has not yet directly addressed the threshold question of whether the statutes ever apply to property owned by governmental defendants.

The texts of the Louisiana statutes provide little direct support for Justice Dennis' position that the statutes do not apply to governmental property. However, the explanation of the model act on which section 2795 was apparently based expressly states that it was "designed to encourage availability of *private* lands by limiting the liability of owners."[149] Of course, when that model act was drafted, many—if not most—governmental bodies were still immune from liability. On the other hand, by the time the Louisiana Legislature adopted section 2795 in 1975, the 1974 Constitution had abolished governmental immunity.[150] How the Louisiana Supreme Court will resolve these conflicting considerations is uncertain, but the narrow construction the court has used thus far at least raises the possibility that it will ultimately find the statutes inapplicable to lands owned by governmental defendants.[151]

If the supreme court does ultimately affirm the lower court decisions on the applicability of the statutes to governmental defendants, it is also likely to hold the statute constitutional. Because the statute would only be extending governmental defendants an immunity also available to private defendants, it probably does not violate the constitutional abrogation of governmental immunity.[152] Furthermore, the statute should also pass equal protection scrutiny because it does not affect a right or class that is entitled to receive more than minimal scrutiny.[153]

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147. Keelen v. State, 454 So. 2d 147, 150 (La. App. 1st Cir. 1984), rev'd on other grounds, 463 So. 2d 1287 (La. 1985).

148. La. R.S. 9:2795(D) (Supp. 1986); see text accompanying supra note 117.

149. Suggested State Legislation, supra note 106, at 150 (emphasis added). In addition, the title of the section in which the suggested legislation appears is "Public Recreation on Private Lands: Limitations on Liability." Id.

150. La. Const. art. XII, § 10. For a brief review of Louisiana law in this area prior to the 1974 Constitution, see Murchison, The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Local Government Law, 38 La. L. Rev. 462, 474 n.73 (1978).

151. Other states have split on the question of whether their statutes confessing immunity for recreational uses apply to governmental defendants, but the majority appear to extend the statutory protections to governmental bodies. See Annot., supra note 106, at 275-80.

152. See Murchison, supra note 28, at 519-20; Comment, supra note 28, at 1207-08.

153. Although the Louisiana Supreme Court's decision in Sibley v. Board of Supervisors, 477 So. 2d 1094 (La. 1985), indicates a willingness to expand the list of categories that receive careful scutiny under the equal protection guarantee of the Louisiana Constitution, the recreational use immunity statute does not appear to classify defendants according to any of the categories identified for closer review. See Murchison, supra note 28, at 517-19; Comment, supra note 28, at 1204-07.

In light of these ambiguities, *Landry* has appropriately described the area the Louisiana statutes cover as one "ripe for legislative attention."[154] Any revision that results from such legislative attention should clearly specify whether the immunity for recreational uses applies to governmental defendants and whether it covers claims premised on article 2317. In addition, it should eliminate the confusion that results from two overlapping statutes on the subject, and it should replace the common law definition of "owner" that is presently found in section 2795. Finally, it should specify with more precision what types of charges or financial arrangements constitute an enterprise as a "commercial, recreational" development to which the immunity does not apply.

In view of the supreme court's narrow construction of sections 2791 and 2795, the statutes are likely to provide only limited benefits to local governments, even if the court allows them to be applied to governmental defendants at all. Municipalities are unlikely to have the "rural or semi-rural" lands that the statutes cover. Moreover, even parishes and special districts which might have some recreational properties that would qualify as rural or semi-rural will receive the benefits of the statutes only with respect to activities that are typical of the "true outdoors." To the extent that local governments currently face a crisis from their exposure to tort liability, that crisis is more likely to be based on activities in developed areas rather than outdoor activities in rural surroundings. As a result, the immunity for recreational uses is likely to have only a marginal impact on local government finances even if the statutory reforms suggested in the preceding paragraph are adopted. To the extent that local governments need or desire significant relief from their tort liability exposure, they would do well to focus on general limitations

154. 477 So. 2d at 675. During its 1986 legislative session, the Louisiana Legislature did pass two amendments to La. R.S. 9:2795 (Supp. 1986), but neither has much significance for local governments. The first extends the protections of the statute to "any lands or waterbottoms owned, leased, or managed by the Department of Wildlife and Fisheries, regardless of the purposes for which the land or waterbottoms are used, and whether they are used for recreational or nonrecreational purposes." 1986 La. Acts No. 976. Because the act grants a governmental body immunity not available to other defendants, it may violate the state constitution's abrogation of governmental immunity. See La. Const. art. X, § 12; Murchison, supra note 28, at 519-20. The second amendment adopted in 1986 extends the statutory protections "to owners of commercial recreational developments or facilities for injury to persons or property arising out of the commercial recreational activity permitted at the recreational development or facility," but only when the injury "occurs on land which does not comprise the commercial recreational development or facility and over which the owner has no control when the recreational activity commences, occurs, or terminates on the commercial recreational development or facility." 1986 La. Acts No. 967.

on liability or damage rules rather than the existing statutes granting immunity for recreational uses of property.